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S. 394

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 16, 2005

Mr. CORNYN (for himself, Mr. LEAHY, Mr. ISAKSON, Mr. ALEXANDER, Mr. NELSON of Nebraska, and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 21, 2006

Reported by Mr. SPECTER, without amendment

A BILL

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Openness Promotes
3 Effectiveness in our National Government Act of 2005”
4 or the “OPEN Government Act of 2005”.

5 **SEC. 2. FINDINGS.**

6 Congress finds that—

7 (1) the Freedom of Information Act was signed
8 into law on July 4, 1966, because the American peo-
9 ple believe that—

10 (A) our constitutional democracy, our sys-
11 tem of self-government, and our commitment to
12 popular sovereignty depends upon the consent
13 of the governed;

14 (B) such consent is not meaningful unless
15 it is informed consent; and

16 (C) as Justice Black noted in his concur-
17 ring opinion in *Barr v. Matteo* (360 U.S. 564
18 (1959)), “The effective functioning of a free
19 government like ours depends largely on the
20 force of an informed public opinion. This calls
21 for the widest possible understanding of the
22 quality of government service rendered by all
23 elective or appointed public officials or employ-
24 ees.”;

1 (2) the American people firmly believe that our
2 system of government must itself be governed by a
3 presumption of openness;

4 (3) the Freedom of Information Act establishes
5 a “strong presumption in favor of disclosure” as
6 noted by the United States Supreme Court in
7 United States Department of State v. Ray (502 U.S.
8 164 (1991)), a presumption that applies to all agen-
9 cies governed by that Act;

10 (4) “disclosure, not secrecy, is the dominant ob-
11 jective of the Act,” as noted by the United States
12 Supreme Court in Department of Air Force v. Rose
13 (425 U.S. 352 (1976));

14 (5) in practice, the Freedom of Information Act
15 has not always lived up to the ideals of that Act; and

16 (6) Congress should regularly review section
17 552 of title 5, United States Code (commonly re-
18 ferred to as the Freedom of Information Act), in
19 order to determine whether further changes and im-
20 provements are necessary to ensure that the Govern-
21 ment remains open and accessible to the American
22 people and is always based not upon the “need to
23 know” but upon the fundamental “right to know”.

1 SEC. 3. PROTECTION OF FEE STATUS FOR NEWS MEDIA.

2 Section 552(a)(4)(A)(ii) of title 5, United States
 3 Code, is amended by adding at the end the following:
 4 “In making a determination of a representative of the
 5 news media under subclause (II), an agency may not deny
 6 that status solely on the basis of the absence of institu-
 7 tional associations of the requester, but shall consider the
 8 prior publication history of the requester. Prior publica-
 9 tion history shall include books, magazine and newspaper
 10 articles, newsletters, television and radio broadcasts, and
 11 Internet publications. If the requestor has no prior publi-
 12 cation history or current affiliation, the agency shall con-
 13 sider the requestor’s stated intent at the time the request
 14 is made to distribute information to a reasonably broad
 15 audience.”.

16 SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION
17 COSTS.

18 Section 552(a)(4)(E) of title 5, United States Code,
 19 is amended by adding at the end the following: “For pur-
 20 poses of this section, a complainant has ‘substantially pre-
 21 vailed’ if the complainant has obtained a substantial part
 22 of its requested relief through a judicial or administrative
 23 order or an enforceable written agreement, or if the com-
 24 plainant’s pursuit of a nonfrivolous claim or defense has
 25 been a catalyst for a voluntary or unilateral change in po-

1 sition by the opposing party that provides a substantial
 2 part of the requested relief.”.

3 **SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CA-**
 4 **PRICIOUS REJECTIONS OF REQUESTS.**

5 Section 552(a)(4)(F) of title 5, United States Code,
 6 is amended—

7 (1) by inserting “(i)” after “(F)”; and

8 (2) by adding at the end the following:

9 “(ii) The Attorney General shall—

10 “(I) notify the Special Counsel of each civil ac-
 11 tion described under the first sentence of clause (i);
 12 and

13 “(II) annually submit a report to Congress on
 14 the number of such civil actions in the preceding
 15 year.

16 “(iii) The Special Counsel shall annually submit a re-
 17 port to Congress on the actions taken by the Special Coun-
 18 sel under clause (i).”.

19 **SEC. 6. TIME LIMITS FOR AGENCIES TO ACT ON REQUESTS.**

20 (a) TIME LIMITS.—

21 (1) IN GENERAL.—Section 552(a)(6)(A)(i) of
 22 title 5, United States Code, is amended by inserting
 23 “, and the 20-day period shall commence on the date
 24 on which the request is first received by the agency,
 25 and shall not be tolled without the consent of the

1 party filing the request” after “adverse determina-
2 tion”.

3 (2) EFFECTIVE DATE.—The amendment made
4 by this subsection shall take effect 1 year after the
5 date of enactment of this Act.

6 (b) AVAILABILITY OF AGENCY EXEMPTIONS.—

7 (1) IN GENERAL.—Section 552(a)(6) of title 5,
8 United States Code, is amended by adding at the
9 end the following:

10 “(G)(i) If an agency fails to comply with the applica-
11 ble time limit provisions of this paragraph with respect
12 to a request, the agency may not assert any exemption
13 under subsection (b) to that request, unless disclosure—

14 “(I) would endanger the national security of the
15 United States;

16 “(II) would disclose personal private informa-
17 tion protected by section 552a or proprietary infor-
18 mation; or

19 “(III) is otherwise prohibited by law.

20 “(ii) A court may waive the application of clause (i)
21 if the agency demonstrates by clear and convincing evi-
22 dence that there was good cause for the failure to comply
23 with the applicable time limit provisions.”.

24 (2) EFFECTIVE DATE AND APPLICATION.—The
25 amendment made by this subsection shall take effect

1 1 year after the date of enactment of this Act and
2 apply to requests for information under section 552
3 of title 5, United States Code, filed on or after that
4 effective date.

5 **SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR RE-**
6 **QUESTS AND STATUS INFORMATION.**

7 (a) IN GENERAL.—Section 552(a) of title 5, United
8 States Code, is amended by adding at the end the fol-
9 lowing:

10 “(7) Each agency shall—

11 “(A) establish a system to assign an individual-
12 ized tracking number for each request for informa-
13 tion under this section;

14 “(B) not later than 10 days after receiving a
15 request, provide each person making a request with
16 the tracking number assigned to the request; and

17 “(C) establish a telephone line or Internet serv-
18 ice that provides information about the status of a
19 request to the person making the request using the
20 assigned tracking number, including—

21 “(i) the date on which the agency origi-
22 nally received the request; and

23 “(ii) an estimated date on which the agen-
24 cy will complete action on the request.”.

1 (b) EFFECTIVE DATE AND APPLICATION.—The
 2 amendment made by this section shall take effect 1 year
 3 after the date of enactment of this Act and apply to re-
 4 quests for information under section 552 of title 5, United
 5 States Code, filed on or after that effective date.

6 **SEC. 8. SPECIFIC CITATIONS IN EXEMPTIONS.**

7 Section 552(b) of title 5, United States Code, is
 8 amended by striking paragraph (3) and inserting the fol-
 9 lowing:

10 “(3) specifically exempted from disclosure by
 11 statute (other than section 552b of this title), pro-
 12 vided that such statute—

13 “(A) if enacted after the date of enactment
 14 of the Openness Promotes Effectiveness in our
 15 National Government Act of 2005, specifically
 16 cites to this section; and

17 “(B)(i) requires that the matters be with-
 18 held from the public in such a manner as to
 19 leave no discretion on the issue; or

20 “(ii) establishes particular criteria for
 21 withholding or refers to particular types of mat-
 22 ters to be withheld;”.

23 **SEC. 9. REPORTING REQUIREMENTS.**

24 Section 552(e)(1) of title 5, United States Code, is
 25 amended—

1 (1) in subparagraph (F), by striking “and”
2 after the semicolon;

3 (2) in subparagraph (G), by striking the period
4 and inserting a semicolon; and

5 (3) by adding at the end the following:

6 “(H) data on the 10 active requests with the
7 earliest filing dates pending at each agency, includ-
8 ing the amount of time that has elapsed since each
9 request was originally filed;

10 “(I) the average number of days for the agency
11 to respond to a request beginning the date on which
12 the request was originally filed, the median number
13 of days for the agency to respond to such requests,
14 and the range in number of days for the agency to
15 respond to such requests; and

16 “(J) the number of fee status requests that are
17 granted and denied, and the average number of days
18 for adjudicating fee status determinations.

19 When reporting the total number of requests filed, agen-
20 cies shall distinguish between first person requests for per-
21 sonal records and other kinds of requests, and shall pro-
22 vide a total number for each category of requests.”.

1 **SEC. 10. OPENNESS OF AGENCY RECORDS MAINTAINED BY**
 2 **A PRIVATE ENTITY.**

3 Section 552(f) of title 5, United States Code, is
 4 amended by striking paragraph (2) and inserting the fol-
 5 lowing:

6 “(2) ‘record’ and any other term used in this
 7 section in reference to information includes—

8 “(A) any information that would be an
 9 agency record subject to the requirements of
 10 this section when maintained by an agency in
 11 any format, including an electronic format; and

12 “(B) any information described under sub-
 13 paragraph (A) that is maintained for an agency
 14 by an entity under a contract between the agen-
 15 cy and the entity.”.

16 **SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERV-**
 17 **ICES.**

18 (a) IN GENERAL.—Chapter 5 of title 5, United
 19 States Code, is amended—

20 (1) by redesignating section 596 as section 597;
 21 and

22 (2) by inserting after section 595 the following:

23 **“§ 596. Office of Government Information Services**

24 “(a) There is established the Office of Government
 25 Information Services within the Administrative Con-
 26 ference of the United States.

1 “(b) The Office of Government Information Services
2 shall—

3 “(1) review policies and procedures of adminis-
4 trative agencies under section 552 and compliance
5 with that section by administrative agencies;

6 “(2) conduct audits of administrative agencies
7 on such policies and compliance and issue reports
8 detailing the results of such audits;

9 “(3) recommend policy changes to Congress
10 and the President to improve the administration of
11 section 552, including whether agencies are receiving
12 and expending adequate funds to ensure compliance
13 with that section; and

14 “(4) offer mediation services between persons
15 making requests under section 552 and administra-
16 tive agencies as a non-exclusive alternative to litiga-
17 tion and, at the discretion of the Office, issue advi-
18 sory opinions if mediation has not resolved the dis-
19 pute.”.

20 (b) TECHNICAL AND CONFORMING AMENDMENT.—
21 The table of sections for chapter 5 of title 5, United States
22 Code, is amended by striking the item relating to section
23 596 and inserting the following:

“596. Office of Government Information Services.
“597. Authorization of appropriations.”.

1 (c) EFFECTIVE DATE.—The amendments made by
2 this section shall take effect 1 year after the date of enact-
3 ment of this Act.

4 **SEC. 12. ACCESSIBILITY OF CRITICAL INFRASTRUCTURE**
5 **INFORMATION.**

6 (a) IN GENERAL.—Not later than January 1 of each
7 of the 3 years following the date of the enactment of this
8 Act, the Comptroller General of the United States shall
9 submit to Congress a report on the implementation and
10 use of section 214 of the Homeland Security Act of 2002
11 (6 U.S.C. 133), including—

12 (1) the number of persons in the private sector,
13 and the number of State and local agencies, that vol-
14 untarily furnished records to the Department under
15 this section;

16 (2) the number of requests for access to records
17 granted or denied under this section;

18 (3) such recommendations as the Comptroller
19 General considers appropriate regarding improve-
20 ments in the collection and analysis of sensitive in-
21 formation held by persons in the private sector, or
22 by State and local agencies, relating to
23 vulnerabilities of and threats to critical infrastruc-
24 ture, including the response to such vulnerabilities
25 and threats; and

1 (4) an examination of whether the nondisclo-
2 sure of such information has led to the increased
3 protection of critical infrastructure.

4 (b) FORM.—The report shall be submitted in unclas-
5 sified form, but may include a classified annex.

6 **SEC. 13. REPORT ON PERSONNEL POLICIES RELATED TO**
7 **FOIA.**

8 Not later than 1 year after the date of enactment
9 of this Act, the Office of Personnel Management shall sub-
10 mit to Congress a report that examines—

11 (1) whether changes to executive branch per-
12 sonnel policies could be made that would—

13 (A) provide greater encouragement to all
14 Federal employees to fulfill their duties under
15 section 552 of title 5, United States Code; and

16 (B) enhance the stature of officials admin-
17 istering that section within the executive
18 branch;

19 (2) whether performance of compliance with
20 section 552 of title 5, United States Code, should be
21 included as a factor in personnel performance eval-
22 uations for any or all categories of Federal employ-
23 ees and officers;

1 (3) whether an employment classification series
2 specific to compliance with sections 552 and 552a of
3 title 5, United States Code, should be established;

4 (4) whether the highest level officials in par-
5 ticular agencies administering such sections should
6 be paid at a rate of pay equal to or greater than a
7 particular minimum rate;

8 (5) whether other changes to personnel policies
9 can be made to ensure that there is a clear career
10 advancement track for individuals interested in de-
11 voting themselves to a career in compliance with
12 such sections; and

13 (6) whether the executive branch should require
14 any or all categories of Federal employees to under-
15 take awareness training of such sections.

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